IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE P.R.RAMAN
&
THE HONOURABLE MR. JUSTICE V.K.MOHANAN

TUESDAY, THE 4TH SEPTEMBER 2007 / 13TH BHADRA 1929

AS.No. 509 OF 2001

OS.459/1995 OF PRL.SUB COURT, IRINJALAKUDA

APPELLANTS/PLAINTIFFS:

1. CHAKKUNNY, S/O. LATE PEREPPADAN OUSEPH,
KORATTY KIZHAKKUMMURY VILLAGE, (NALUKETTU),
MUKUNDAPURAM TALUK. (DIED)

2. P.I. GEEVARGHESE (GEERVADHESE),
S/O. LATE PEREPPADAN ITTOOP,
KORATTY KIZHAKKUMMURY VILLAGE,
(NALUKETTU), MUKUNDAPURAM TALUK.

(THE FIRST APPELLANT DIED. L.RS. ARE IMPLEADED)

BY ADV. SRI.D.KRISHNA PRASAD
SRI.S.SUJITH
SRI.D.NARENDRANATH
SRI.JOJI VARGHESE
SRI.M.HARISHARMA
SRI.T.P.ELDHOSE

RESPONDENTS/DEFENDANTS::

1. DEVASSY, S/O. LATE PEREPPADAN LONA, KORATTY
KIZHAKKUMMURY VILLAGE, (NALUKETTU),
MUKUNDAPURAM TALUK.

2. ANTONY, S/O. LATE PEREPPADAN LONA, KORATTY
KIZHAKKUMMURY VILLAGE, (NALUKETTU),
MUKUNDAPURAM TALUK.

3. JOSE, S/O. LATE PEREPPADAN LONA, KORATTY
KIZHAKKUMMURY VILLAGE, (NALUKETTU),
MUKUNDAPURAM TALUK.

4. JOSE, S/O. PEREPPADAN ITTOOP, KORATTY KIZHAKKUMMURY VILLAGE, (NALUKETTU), MUKUNDAPURAM TALUK.

5. JACOB, S/O. LATE PEREPPADAN ITTOOP, KORATTY KIZHAKKUMMURY VILLAGE, (NALUKETTU), MUKUNDAPURAM TALUK.

6. JOHN, S/O. LATE PEREPPADAN ITTOOP, KORATTY KIZHAKKUMMURY VILLAGE, (NALUKETTU), MUKUNDAPURAM TALUK (NOW AT MURINGOOR P.O., TRICHUR DISTRICT.)

7. GEORGE, S/O. LATE PEREPPADAN ITTOOP, KORATTY KIZHAKKUMMURY VILLAGE, (NALUKETTU), MUKUNDAPURAM TALUK.

8. DAVIS, S/O. LATE PEREPPADAN ITTOOP, KORATTY KIZHAKKUMMURY VILLAGE (NALUKETTU), MUKUNDAPURAM TALUK.

9. PAULY, S/O. LATE PEREPPADAN ITTOOP, KORATTY KIZHAKKUMMURY VILLAGE (NALUKETTU), MUKUNDAPURAM TALUK.

ADDITIONAL RESPONDENT:

10. ANNAKUTTY, W/O.. LATE CHAKKUNNY, PEREPPADAN HOUSE, PONAMBIYOLI, P.O.. KUTTICHIRA, TRICHUR DISTRICT.

11. P.C. JOSE, S/O. LATE CHAKKUNNY, PEREPPADAN HOUSE, PONNAMBIYOLI, P.O. KUTTICHIRA, TRICHUR DISTRICT.

12. P.C. JOY, S/O. LATE CHAKKUNNY, PEREPPADAN HOUSE, PONNAMBIYOLI, P.O,. KUTTICHIRA, TRICHUR DISTRICT.

13. P.C. ITTEERA, S/O. LATE CHAKKUNNY, PEREPPADAN HOUSE, PONNAMBIYOLI, P.O. KUTTICHIRA, TRICHUR DISTRICT.

14. P.C. JOHNSON, S/O. LATE CHAKKUNNY, PEREPPADAN HOUSE, PONNAMBIYOLI, P.O. KUTTICHIRA, TRICHUR DISTRICT.

15. P.C. DIXON, S/O. LATE CHAKKUNNY, PEREPPADAN HOUSE, PONNAMBIYOLI, P.O. KUTTICHIRA, TRICHUR DISTRICT.

16. P.C. ROKI, S/O. LATE CHAKKUNNY, PEREPPADAN HOUSE, PONNAMBIYOLI, P.O. KUTTICHIRA, TRICHUR DISTRICT.

17. MARY THOMAS, W/O.. P.M. THOMAS, PAYYAPPILLY HOUSE,

MANGALAM DAM, OLIMKODE P.O., PALAKKAD DISTRICT.

18. RANI LUVIS , PARAPPURAM HOUSE, VELLIKULAM P.O., KURINJIPADAM, THRISSUR DISTRICT.

(ADDITIONAL RESPONDENTS 10 TO 18 ARE IMPLEADED AS THE L.RS OF THE FIRST APPELLANT AS PER ORDER IN CMP NO. 4695/2001 IN A.S. 509/01 DATED 7.12.2001.)

R1, R2 & R3 BY ADV. SRI.ROY CHACKO
SRI.P.V.PAULSON
ADDL. RESPONDENTS 10 TO 18 BY ADV. SRI.C.K.SURESH

THIS APPEAL SUIT HAVING BEEN FINALLY HEARD ON 04/09/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.R. RAMAN & V. K. MOHANAN, JJ.

A.S. NO. 509 OF 2001

DATED THIS, THE 4TH DAY OF SEPTEMBER, 2007.

J U D G M E N T

Raman, J.

Appellants are the plaintiffs in O.S. No. 459/1995 on the file of the Sub Court, Irinjalakuda. The suit was instituted for partition of plaint schedule property, which consists of an extent of 95 cents of which 80 cents is in Sy. No. 1093/1 and 15 cents in Sy. no. 899/1 of Kizhakkummuri Village. According to the plaintiffs, the plaint schedule property belonged to one Ouseph, who had three sons, namely, Chakkunni, the first plaintiff, Ittoop and Lona. The first plaintiff Chakkunny died during the pendency of the appeal whose legal representatives are brought on record as Respondents 10 to 18 in the appeal. The second plaintiff is one of the sons of Ittoop, who prosecutes the appeal.

2. According to the plaint averments, the plaintiff is entitled to get 1/21 shares each. The defendants contended that the plaint schedule properties were sold by Ouseph to Lona, as per Ext.B2 dated 27.10.1953 and subsequently, Lona assigned the property by way of gift in favour of the first defendant as per Exts.B5 and B6, during the period 1978 and 1990

respectively. It is also pointed out in the written statement that there is a mistake in the plaint schedule items and according to the contesting defendants, the correct survey number of the plaint schedule items are 1093/3 and 899/2. The plaintiff, however, did not seek to amend the plaint by incorporating any challenge against Ext.B2 and claiming any specific relief against Ext.B2. Both sides proceeded on trial and adduced evidence. Exts. A1, A1(a) and A1(b) were marked and PWs 1 and 2 were examined on the side of the plaintiff. Exts.B1 to B25 (h) were marked and DWs 1 and 2 were examined on the side of defendants. Exts.X1 to X1(c) were were marked as witness exhibits. Defendants 4 to 9 remained ex parte and as already noticed above, defendants 1 to 3 alone contested the matter by filing a joint written statement. According to them, as per a will executed by Ouseph, he had bequeathed certain items of property in favour of Ittoop and Chakkunni, the other two sons of Ouseph; but Lona was not given any property, as a reason alleged for the execution of Ext.B2. Copy of the Will is produced as Ext.B1.

3. We have gone through the recitals contained in Ext.B1 which however shows that Lona had also been given some property though not

immovable property, in the sale proceeds of two items earlier sold had been given to him as per the Will Ext.B1. But that by itself is not a reason to hold that Ext.B2 document is anyway vitiated. The court below proceeded to consider the plea of the plaintiffs that Ext.B2 could not have been executed by Ouseph as according to the plaintiffs he died long prior to the execution of Ext.B2 document. According to them, Ouseph died in the year 1952. The court below found on an analysis of the evidence on record that Ouseph died only in the year 1956. As a matter of fact, Ext.B4 document executed in favour of the first plaintiff itself is in the year 1956. The materials on record would also go to show that the finding of the court below that Ouseph died only in the year 1956 and not in the year 1952 is perfectly correct. In such circumstances, the said finding is confirmed.

4. Even though the plaintiffs, in the evidence, sought to set up a contention that Ext.B2 document was not executed by Ouseph, no attempt was made to raise such a plea by seeking amendment of the plaint by incorporating necessary averments to that effect and seeking necessary reliefs, despite the fact that the defendants had set up an independent right as per Ext. B2 on the plaint schedule item contending that the same is not

liable to be partitioned. Though a petition as CMP 4204/2002 is filed before this Court seeking amendment of the plaint, we are not satisfied that sufficient reasons are made out for allowing amendment at this belated stage. In a suit for partition of the only item, when the defendants had set up a plea that the plaint item belongs to them absolutely as per Ext.B2, necessarily, the plaintiff, if so advised, ought to have amended the plaint seeking necessary relief against Ext.B2. The contention of the plaintiff that it is an inadvertent omission to seek amendment of the plaint earlier cannot be accepted. Even the appeal was filed in the year 2001; but the amendment application was filed only in the year 2002. The plea as raised by way of an amendment ought to have been filed within a period of three years at least from the date on which the written statement was filed. Thus, the plea that Ext.B2 is fraudulently obtained and the relief sought for based on the said contention, have already barred by the law of limitation. In this connection we are fortified by the decision of the apex court in **Muni Lal v. Oriental Fire & General Insurance Co. Ltd.** (1996 SC 642). Accordingly, we dismiss CMP 4204/2002.

5. The next point to be considered is whether on the averments made

in the plaint and on the evidence adduced, the court below was justified in dismissing the suit without considering as to whether there was any mistake in the survey number as alleged in the written statement. In this connection, it has to be noticed that even though the defendant had contended that the actual Survey Number is 1093/3 and 899/2, the defendant did not produce the copy of the partition deed based on which Ouseph obtained the property in question. Since the defendant is setting up a plea that the property included in the plaint schedule is their separate property which was sold to them by Ouseph and the documents produced by them namely, Ext.B2 shows a different survey number, an issue should have been raised as to whether the survey number mentioned in the plaint or the survey number mentioned in Ext.B2 is the correct survey number and whether plaint schedule items and the property covered by Ext. B2 are the same, going by the boundaries shown. The court below has not considered this aspect of the matter before non-suiting the plaintiffs.

6. In the circumstances, the matter is remanded to the court below for the limited purpose of raising an additional issue regarding the correct survey number of the property and its identity and to consider whether the

said property has been conveyed to the first defendant by Ext.B2 and mould the relief accordingly. Both sides shall be given opportunity to adduce additional evidence, if any required on the above said issue. The appeal is allowed by way of remand.

The parties shall appear before the court below on 16.10.2007.

P.R. RAMAN,
(JUDGE)

V.K. MOHANAN,
(JUDGE)

knc/-

P.R. RAMAN &
V.K. MOHANAN, JJ.
=== == ==== ==

A.S. NO. 509 OF 2001
=== =========

J U D G M E N T

4TH SEPTEMBER, 2007